

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Amendment of 47 C.F.R.)
§1.1200 et seq. Concerning)
Ex Parte Presentations)
In Commission Proceedings)

GC Docket No. 95-21

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COMMENTS OF SPRINT CORPORATION

Sprint Corporation hereby submits its comments on the Notice of Proposed Rulemaking released February 7, 1995 in the above-captioned proceeding (FCC 95-52).

In the Notice, the Commission proposes substantial revisions to simplify and clarify its rules governing ex parte presentations. While, in some respects, the proposed rules would be more restrictive than the existing rules,¹ the Commission's proposals, taken as a whole, would result in fewer restrictions than now exist. Restricted proceedings would essentially be confined to those that have been designated for an evidentiary hearing or those involving mutually exclusive applications not subject to auction or lottery procedures (see proposed §1.1208). The Commission also proposes to revise its "permit but disclose" rules by

¹ E.g., contested tariff filings, which are now considered exempt, would become subject to "permit but disclose" procedures.

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requiring a more complete description of oral presentations than is now the case, but, as a consequence, permitting the filing of the summary within three days, rather than on the same day as is required under the present rules. The Commission also proposes to impose its "sunshine period" blackout of ex parte presentations on items that are voted upon by circulation; the sunshine period for such items would commence with the issuance of a news release announcing Commission action on a circulation item and would continue until the text of the decision or order is released.

Sprint supports the rule changes proposed by the Commission. It believes the proposed rules are much clearer in their application than the existing rules. Furthermore, the proposal to require more complete disclosure of oral communications is a step towards the Commission's stated objective (see ¶1) of improving the public's ability to communicate with the Commission in a manner that comports with fundamental principles of fairness.

Sprint has some additional suggestions to offer, which are described at 5-6 below, in order to foster the attainment of that fairness objective. To put those proposals in context, Sprint has misgivings about the extent to which the Commission relies on ex parte communications, rather than formal submissions, in arriving at its decisions. Obviously, the Commission must have flexible procedures to enable it to

obtain the information it needs to make a well-informed decision in a timely manner. However, undue reliance on ex parte communications can raise questions about the integrity of the Commission's procedures. The availability of ex parte channels of communication might induce some parties to file formal pleadings that are sketchy in their content or that take extreme positions that do not represent the real, bottom-line position of the party, on the theory that it would be more advantageous to articulate a detailed or sincere position on the issues outside the normal pleading cycle. Moreover, in cases where it is commonly known when the public notice invoking the "sunshine" blackout period is likely to be issued, parties can "game" the process by withholding information until the last minute, so other parties have no opportunity to respond.²

² A recent example is a BellSouth ex parte submission filed in CC Docket No. 94-1 on March 23, 1995, the same day the Commission's "sunshine" notice was issued. See letter dated "March 20 (sic), 1995" (but stamped "received" by the Office of the Secretary on March 23, 1995) from W.W. Jordan of BellSouth to the Commission's Secretary, attaching a letter dated (and received) March 23, 1995 from Mr. Jordan to the Chief of the Common Carrier Bureau. The BellSouth submission included, inter alia, the results of a purported study of long distance calling plans which was conducted "[d]uring the spring and summer of 1994" and thus presumably could have been filed somewhat earlier than March 23, 1995. See id., attachment entitled "PNR and Associates Bill Harvesting Study" at 1.

The ex parte process also consumes a great deal of Commission and staff time, and does so in a way that is not always the most conducive to an efficient gathering of information or views. A Commissioner or staff member may hear from one party on a particular docket today, but may not hear from an opposing party until several days or even weeks later, by which time elements of the first party's presentation may have been forgotten. Also, hearing from parties one at a time gives no opportunity for opposing parties to join the issues and respond to each other's assertions or arguments on a real-time basis. The process now in place would be akin to a court of appeals hearing oral argument from a petitioner seeking review of an FCC decision, outside the presence of FCC counsel, and then hearing from FCC counsel days or weeks later, outside the presence of petitioner's counsel.

The Commission's widespread reliance on ex parte contacts reflects an institutional preference for an approach to decisionmaking that more closely resembles the legislative paradigm than a judicial model. While that choice may be within the Commission's prerogatives, it is important, as the Notice recognizes, to ensure that the ex parte processes are fundamentally fair to interested parties.

The requirement that summaries of oral presentations be much more detailed than is now required is an important step in the right direction. However, more detailed summaries may

be of little benefit in cases where time is of the essence (e.g., in cases where the sunshine period may be about to commence), if other interested parties remain unaware that these communications have taken place. Although the Commission periodically publishes notices of ex parte submissions, there is a substantial time lag between the issuance of such notices and the dates of the presentations they disclose. For example, in one recent notice, dated February 22, 1995 (Mimeo No. 52308), the presentations listed were made between January 30 and February 3 -- roughly three weeks before the notice was published. And, sometimes, the notices are incomplete.³ Such a time lag, in a proceeding on a fast track or on the verge of a sunshine blackout, may give many parties no opportunity to know what was said by others and to respond to it in a timely fashion. While it is possible to check the public reference room instead of waiting for the Commission's notices of ex parte presentations to be published, it is generally only large entities that have the resources to do so. Parties with out-of-town counsel or parties that cannot afford a daily visit by their counsel to the Commission's offices are therefore placed at a procedural disadvantage.

³ See, e.g., correction released February 21, 1995 (Mimeo No. 52273) listing presentations received on January 26-27.

Sprint urges the Commission to eliminate this potential source of unfairness by requiring a party making an ex parte presentation to serve a copy of that presentation⁴ or summary (in cases where the presentation was oral) on all other parties to the proceeding, to the extent that formal pleadings are required to be served. In cases where the service of formal submissions is not required (e.g., most pleadings in rulemaking proceedings), Sprint would urge the Commission to publish a daily public notice of ex parte submissions, much as it publishes a daily log of tariff filings.⁵ Such timely service or notice of ex parte presentations, coupled with the

⁴ This proposal would require modification of the definition of a written ex parte presentation which, in proposed section 1.1202(b)(1), is defined as one that is not served on parties to the proceeding. Sprint believes a better definition of an ex parte presentation would be a written presentation that is not provided for in Part 1 of the Rules for the particular type of proceeding or in a public notice.

⁵ An alternative would be to require service of ex parte submissions on all persons who have filed comments in the rulemaking proceeding. If the Commission were to decide to take that approach, it should not require service on persons who have submitted comments in the form of letters rather than formal pleadings in conformity of Section 1.49 of the Rules. Persons filing such letter comments typically do not file reply comments and do not engage in follow-up contacts with the Commission or its staff. Excepting these persons from the service requirement would reduce the active parties' cost of serving ex parte presentations.

Commission's proposed reform of the notification requirements for oral presentations, should materially advance the fairness of the Commission's processes.

Respectfully submitted,

SPRINT CORPORATION

A handwritten signature in dark ink, appearing to read "Leon M. Kestenbaum", is written over the printed name.

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